No. 21700

IN THE

United States Court of Appeals For the Ninth Circuit

NORMAN B. SATHER,
Appellant,

v.

GENERAL ELECTRIC COMPANY,
a New York corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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SUBJECT INDEX

TABLE OF AUTHORITIES

Table of Cases

Other Authorities

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BRIEF OF APPELLEE

ADDITIONAL STATEMENT OF THE CASE

On October 11, 1965, about 11:00 a.m., when the weather was dry, the appellant backed his 1964 Ford van truck onto appellee's truck loading ramp. He intended to pick up some appliances. He had followed this practice when getting appliances at the General Electric warehouse at Tukwila near Seattle, Washington, once to twice a week from several years prior to this incident. The warehouse was built in 1961. The driveway or truck loading ramp where the appellant parked his truck was constructed in compliance with the City of Tukwila Building Code in existence at the time of the construction of the building. After parking his truck the appellant saw fit to walk on a curbing alongside the ramp toward the

loading platform. When part way to the platform his foot slipped off the curb. The appellant did not know what caused him to slip (Tr. 60). The appellant said that there was no obstruction on the curbing at all. There was no foreign substance and it was dry (Tr. 51). The appellant chose to take this course rather than walk off the ramp and use the stairs provided to get onto the loading platform. The appellant was thoroughly familiar with the premises. He now seeks damages for the injuries he sustained when he slipped.

The incident occurred on the east side of the warehouse on a two-lane ramp running in a general easterly and westerly direction. After appellant had backed his truck against the loading platform, he got out on the left side and proceeded toward the loading platform as above indicated.

The width of the driving surface of the ramp is 18 feet 9 inches, not 15 feet 9 inches as stated in appellant's brief, thus allowing 9 feet 4½ inches for each half of it. There is a white centerline dividing the two halves. The entire area, including the two halves or parking lanes on the elevated ramp, was unoccupied at the time the appellant parked his truck. The van of the appellant's truck was 6 feet 6½ inches in width, thus leaving 2 feet 10 inches in which to maneuver the truck, without imposing upon the adjoining half of the ramp. The driving surface of the ramp is 23 inches above the ground level, while the curbing is 8 inches, thus making a total of 31 inches from the top of the curb to the ground level.

The appellant had driven his truck upon this ramp and picked up merchandise at the warehouse, approximately

once or twice a week for the last three years (Tr. 17, 47). It had been his practice in the past to walk along the curb as he was doing on the day of the accident.

The appellant's witness, Lester Nelson, stated in an affidavit on October 5, 1966, that both lanes on the ramp were empty when the plaintiff started backing up (Tr. 85).

After the truck was parked, the appellant left the vehicle by its left front door, thus placing himself on the north side of the ramp. He states that he did not get out of the right side of the cab because of merchandise he had previously placed on the right seat (Tr. 20). After he left the cab he stepped onto the curbing. He started toward the building. He went a few steps, three or four, and then returned to the truck for some papers. Thereafter he started walking back toward the building, during which time he was putting the papers into his inside shirt pocket (Tr. 118). He had gone approximately half way to the building when his foot slipped off the curb, and he fell (Tr. 57).

Customarily the appellant parked his truck in the same lane as it was in at the time of this accident and customarily he walked back toward the building on the curbing. For three years prior to this time he had never had any other trouble. Although he had papers in his hands he claims to have been walking straight ahead and looking downward, and had no difficulty seeing where he was walking (Tr. 51).

The appellant testified he could have gone down the ramp to the ground level and then used the stairs to get onto the loading platform (Tr. 50). He chose to go by

way of the curbing as it was easier than going down the ramp (Tr. 66). On this occasion he did not remember if he supported himself against the side of the vehicle.

William P. Steiner, Manager of Operations of the warehouse reached the scene of the accident immediately after its occurrence and heard the appellant say that his falling was due to his own carelessness (Tr. 100). It was stipulated at the trial that if the witness Roland Schmitt was called, he would testify the appellant made such a statement in his presence (Tr. 121).

As previously indicated the appellant testified that he did not know why he fell or what caused him to fall. He further stated that his slipping off the curb was an accident (Tr. 123). He admitted there were no obstructions on the curbing and there was no foreign substance on the cement. It was a dry day (Tr. 51).

ARGUMENT FOR APPELLEE

Throughout the appellant's brief he has referred to the alleged variation between the court's oral decision and its Findings of Fact and Conclusions of Law and designates this as the seventh specification of error. The courts generally have held that an oral decision is pre-empted by the entry of Findings of Fact and Conclusions of Law. The following Washington cases are in conformity with the general rule. In *Landry v. Seattle P.A.&W.R. Co.*, 100 Wash. 453, 171 Pac. 231, it was contended the court had no power after orally deciding a motion, to overrule its oral decision. The court said:

> ". . . We think it has been fairly settled by the decisions of this court that the formal judgment as entered is the judgment of the court, irrespective of memorandum opinions or minute entries, excepting,

of course, a judgment entry made by the clerk under the statute directing that such judgment should be entered by the clerk in cases tried by a jury."

In *Quigley v. Barash,* 135 Wash. 338, 237 Pac. 732, it is said:

> "Some contention is made that the trial court at the close of the testimony gave an oral decision adverse to its written findings. The court's oral decision was not a finding of fact, and under our repeated decisions the final ruling was 'within the breast of the court' until it entered its formal findings."

And in *Ritter v. Johnson,* 163 Wash. 153, 300 Pac. 518, the Washington court again said:

> "Appellant first contends that the court erred in entering judgment in respondents' favor, having once orally announced a decision in the appellant's favor to the effect that the action would be dismissed. No judgment having been entered, the court was at liberty to change its ruling, and no error can here be predicated upon the fact that such change was made."

In *McClelland v. McClelland,* 170 Wash. 170, 15 P.2d 941, at page 174 the court said:

> "The purpose of the memorandum decision was to guide counsel in the preparation of findings of fact and conclusions of law and the final order. Until such instruments were signed the disposition of the cause was subject to the conscience of the court and the trial court did not err when it struck from the files its memorandum decision and thereafter entered an order inconsistent therewith."

In the case at bar Judge Bowen remarked in his oral decision that:

> "The court will settle and enter appropriate findings, conclusions and judgment in this case on December 19, 1966" (Tr. 125).

Clearly the oral opinion, which was very short, was not intended to be findings of fact and conclusions of law.

Findings and Judgment Are Presumptively Correct and Are Not to Be Set Aside Unless "Clearly Erroneous"

Rule 52(a) of the Federal Rules of Civil Procedure, provides in part as follows:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

In *Wick v. Keshner*, 244 F.2d 147, the Eighth Circuit held that a district court's findings are presumptively correct and would not be disturbed unless clearly erroneous. To the same effect is *Fix Fuel & Material Company v. Wabash Railroad Co.*, 243 F.2d 110.

In *Bloom v. United States*, 272 F.2d 215, this court said:

> "We do not sit to second guess the trial court, nor do we have power to do so under Rule 52(a) . . ."

It was further stated:

> "On appeal such finding of the trial court cannot be set aside unless it is 'clearly erroneous' under the doctrine of *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L.Ed. 746 (1948). As this court said in *Overman v. Loesser*, 9 Cir., 205 F.2d 521, 524 (1953), certiorari denied 1953, 346 U.S. 910, 74 S. Ct. 241, 98 L.Ed. 407, 'Since the finding involved the credibility of witnesses, and since it is supported by substantial evidence, it is conclusive upon appeal.'"

And in *Western Surety Company v. Redman Rice Mills, Inc.*, 271 F.2d 885, 890:

> "The major or basic point stressed by appellants is that 'there was no evidence that defendant was guilty of negligence in any respect in the performance of its duties under the Uniform Rice Storage Agreement.'
>
> "We preface our discussion of this contention with the observation that these cases were tried to the court without a jury. This brings into play Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A., which provides that 'findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .'
>
> " 'The findings of fact of a trial judge sitting without a jury should not be set aside unless it is clearly demonstrated that they are without adequate evidentiary support in the record or were induced by an erroneous view of the law.' "

Jennings v. Murphy, 194 F.2d 35, was a case involving personal injuries arising out of an automobile accident. There the rule is stated as follows:

> "We need not advert to citation of authority that under the procedure prescribed for United States Courts, the function of deciding all questions of fact is that of the jury or, in the absence of a jury trial, that of the trial court and that this rule has its reason and foundation not only in the constitution but also in the fact that those who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of the courts of review who do not enjoy the same advantages. Under no circumstances are we authorized to reverse findings of fact unless they are clearly erroneous. Federal Rules of Civil Procedure, Rule 52(a), 28 U.S.C.A."

The case of *United States v. Stoppelmann,* 266 F.2d 13, involves a tort claim against the government, wherein it was stated:

> "There is little or no dispute as to the basic facts in this case, but the conclusions and inferences drawn from these facts are challenged by defendant as being unwarranted by the undisputed evidence. The findings of the court are presumptively correct and should not be set aside on appeal unless clearly erroneous or based upon an erroneous view of the applicable law. . . . In considering the question of the sufficiency of the evidence to sustain the findings, the evidence must be viewed in a light most favorable to the prevailing party, and the prevailing party is entitled to the benefit of all such favorable inferences as may reasonably be drawn from the facts proven. The trier of facts, whether court or jury, is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and on appeal all conflicts in the evidence will be presumed to have been resolved in favor of the prevailing party."

See also *Petri v. Rhein,* 257 F.2d 268, *Boernhoeffer v. United States,* 190 F.2d 358, and *Hoyt v. General Insurance Company of America,* 249 F.2d 589 (Ninth Cir).

ARGUMENT IN ANSWER TO APPELLANT

Answer to Part I of Appellant's Brief, Page 5

The appellant complains that there was no mention by the District Court of the duty the appellee owed the appellant. He asserts in his brief that he was a business invitee. We agree with the latter assertion; so did the trial court. He specifically found in Finding VI that:

> "The plaintiff was a business invitee at the time of the accident referred to in his complaint."

Appellant's complaint that the trial court did not mention the duty the appellee owed the appellant is unwarranted. The trial court's findings contained in Paragraph V are succinct and clear. The court specifically found that the appellee had exercised reasonable and ordinary care in connection with the matters of which the appellant complains.

It found that the ramp or driveway was built in compliance with the Building Code of the City of Tukwila. It found:

> "That the defendant exercised reasonable and ordinary care in the design, building, construction and maintenance of said inclined driveway."

Thus, it is clear that the court did recognize that there was a duty on the part of appellee to maintain its place of business in a reasonably safe condition. The court even stated in its oral decision that:

> "No danger existed before and no negligent or wrongful act was done by the defendant before or after plaintiff's truck came in to the loading ramp."

(Tr. 125). The court, in its Findings Nos. V and VI, found the building was in all respects reasonably safe. That finding was supported by the testimony of the appellant who used the premises in the same way for over three years, twice a week, and even on the day of the accident he could find nothing wrong or unusual from what he had seen and observed before. The court also made the finding that the inclined driveway was not of such a degree as to require any hand rails and as the court affirmatively stated:

> "Reasonable and ordinary care was exercised by the appellee."

Appellee's Answer to Part II of Appellant's Brief, Page 11

Appellant takes the position the court erred in "holding the defendant was not guilty of willful and wanton misconduct in the construction and maintenance of its loading ramp." How can appellee be guilty of willful and wanton misconduct in reference to the construction and maintenance of the loading ramp when its design was approved by the authorities of the City of Tukwila, and the building had been used for over three years prior to the accident in question with no evidence of any prior injuries or complaints? There was never a complaint from the appellant who had used it some 300 times before this accident without difficulty. The entire area was open and apparent and there was nothing hidden or concealed. As is stated by the trial court, no danger existed before the appellant drove onto the ramp.

Appellant cites the case of *Adkisson v. Seattle,* 42 Wn. 2d 676, 258 P.2d 461, for its definition of wanton misconduct as being:

> "the intentional doing of an act or the intentional failure to do an act in reckless disregard for the consequences."

There is a complete absence of any evidence that would even suggest the conduct referred to in the quote. Willful or wanton misconduct is not even remotely related to this case. On page 12 of the brief, the appellant argues that appellee had actual knowledge of the ramp's alleged inadequacy. It had served satisfactorily for the prior three years without complaint by anyone. Appellant also argues the apparent danger was obvious to even a naive, reasonably prudent man. If that is so, then it should

have been just as obvious to the plaintiff, and as a reasonably prudent man he should not have made use of it, or at the very least, he should have called it to the appellee's attention rather than to use it two times a week for a period of three years. It is interesting to note the appellant stated that he had no idea of the cause of his fall, but that it was simply an accident.

In the case of *Ranniger v. Bryce*, 51 Wn.2d 383, 318 P.2d 618, Washington Supreme Court said:

> "Wanton misconduct is not negligence. It requires the intentional doing of an act or the intentional failure to do an act, as distinguished from negligence, which is predicated upon the wrongdoer's carelessness, recklessness or inadvertence."

Certainly there was no evidence to support a charge or claim of wanton misconduct.

Appellee's Answer to Parts III and IV of Appellant's Brief, Pages 20 and 21

The appellant claims the court erred in holding that he was guilty of contributory negligence and assumed the risk. The court in Paragraph VI of the Findings of Fact found:

> "He was guilty of negligence which was the sole proximate cause of the accident. That if the plaintiff was in fact required to walk upon the curbings along the north side of said driveway that resulted only because of the plaintiff's positioning his vehicle too close to the edge; that he was negligently using the curbing as a walkway rather than the surface of the inclined driveway, that he assumed whatever risks there may have been in walking upon this curbing and that he failed to use reasonable and ordinary care in observing the area where he was walking."

It must be remembered the appellant was fully knowledgeable of the appellee's premises. He had gone that way hundreds of times before. The premises remained unchanged. There was no impairment; there were no foreign objects on the ground. The dangers, if any, were created by the activities of the appellant.

He had the opportunity of parking his truck in either the north or south lane. He chose to park it in the north lane. He had the choice of getting out of either side of his truck cab. He had the choice of walking a few steps down the sloped ramp approach in front of his parked truck and then proceeding on the level to the steps leading up to the loading platform. He chose to walk on the 5½ inch curb. According to the testimony of a disinterested witness, he chose to preoccupy himself with papers and a notebook and to proceed to put these papers in his shirt pocket while he was walking along the curbing. With this testimony before him, it is easily understood why the court found that the appellant was guilty of contributory negligence.

CONCLUSION

The Findings of Fact, Conclusions of Law and Judgment are supported by the record. The court's findings should not be disturbed because they are proper, logical and consistent with all of the evidence. Certain it is that there is nothing in the record to support any claim that the trial court's Findings were "clearly erroneous." It follows that the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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